Supreme Court of the United States

October Term, 1959.

No. 39

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

versus

ROBERT DeMARIO JEWELRY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS.

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September, 1959.

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STATEMENT.

The statement of the case in petitioner's brief is adequate and correct, except that the statement on page 5 of the brief referring to the District Court's refusal to grant reimbursement for lost wages "without finding any mitigating circumstances with respect either to the unlawful discrimination or to the resulting wage losses" could be misleading in that, although the trial court did not

state its reasons other than the "exercise of the court's discretion" for declining to order payment for lost wages, obviously some factor or factors in the case motivated the court in this decision. Whatever the reasons, they are not apparent from the printed record here in this case.[1]

SUMMARY OF ARGUMENT.

I.

The district courts do not have jurisdiction under the Fair Labor Standards Act to order reimbursement for loss of wages resulting from unlawful discriminatory discharge in violation of Section 15 (a)(3) of the Act. Petitioner's arguments are to the effect that this power *should* exist; that the Secretary *needs* such power for effective enforcement of the Act; and that without such power in the court the employee is not fully protected from loss of wages between discharge and reinstatement. We contend that such arguments should be directed to Congress.

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[1] The first footnote on page 5 of petitioner's brief states that Elizabeth Duke "had been unemployed at all times since her discharge, although she had actively sought employment and was at all times ready and able to work (Tr. 34-35, 297)." We do not view these considerations as relevant in this Court's review of the case. The question here involves the jurisdiction of the district court. The question regarding abuse of discretion by the trial court would require a review of the evidence, which in this case included, by stipulation, all of the evidence and testimony in two cases involving wage suits for 13 employees: *James P. Mitchell v. Robert DeMario Jewelry, Inc., and Robert DeMario,* Civil Actions Nos. 649 and 654, U.S.D.C., Middle District of Georgia. The trial of the three cases involved over 20 witnesses and 4 days. We comment upon the exercise of the court's discretion under argument II in this brief.

A.

1. The Fair Labor Standards Act did not originally grant such power to the district courts; nor is such power derived from the ancillary powers of equity jurisdiction. Section 17 of the Act grants the court the power "to restrain violations of Section 15". The prohibited acts enumerated in Section 15 are of the nature that the restraint of future violation thereof by an injunction, acting prospectively, would carry out the policy and purposes expressed in the Act, and only in the event of a discharge, which had already occurred, would it be necessary to order the restoration of the *status quo*, which would be effected by the offer of reinstatement without any "restitution". The absence of any provision in the Act to validate a claim for lost wages shows a policy not to permit such restitution as one of the means of enforcement. The courts give effect to the plain unambiguous meaning of a statute, and do not extend it to cases not within its words.

2. Nor can equity use "ancillary" power to order payment of such lost wages. Petitioner urges that such power exists in equity to make restraint effective and to vindicate public policy. There being no legal right in the employee to recover such lost, or ad interim, wages, no legal or equitable relief can be granted. Equity follows the law. Furthermore, such damages, not having any basis in the statute, become punitive—for the vindication of society—and equity will not assess punitive damages in the absence of specific statutory provision therefor. Ancillary powers of equity refer to

the exercise of legal powers in conjunction with equitable powers subordinate to the principal equitable proceeding.

The contempt cases relied upon by petitioner and some courts as a basis for mandatory orders to "restore the *status quo*" are not authority for the power of equity to expand a statute or the jurisdiction of the court thereunder. The power to protect itself in its own decree does not expand the court's power to decree.

The burden upon the employee in losing wages between unlawful discharge and reinstatement is not one Congress has seen fit to relieve; nor is it so unusual a burden; for everyone who resorts to the courts to enforce legal rights are faced with the delays of litigation and resulting losses caused thereby. The delays are more the fault of enforcement than of the Act itself. The similar plea of an employer in an effort to show the inequity of a certain construction of another statute was ignored by the court. See *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177.

3. The decision in *Walling v. O'Grady*, 146 F.2d 422, is not authoritative, having been based upon erroneous assumptions and having misconstrued and misapplied the powers of equity. It assumed a legal right in the employee to recover lost wages; it failed to distinguish between the power of equity in contempt cases and the ancillary powers of equity in cases of this sort; and it argued that the employee is left without adequate protection. The court grounded its decision in the tradi-

tional powers of equity following Judge Woodrough's concurring opinion in *Walling v. Miller*, 138 F.2d 629, 633; but the application of this principle under the *O'Grady* facts was erroneous.

4. Petitioner, not finding language in the Fair Labor Standards Act granting the power sought here, calls upon other enactments and decisions thereunder as the basis for such power. But in each statute cited there is ample specific language, or general power granted, upon which the courts, in construing those statutes, based their decisions. The National Labor Relations Act, 29 U.S.C.A. 151, et seq., is broader in scope and its enforcement machinery accordingly more extensive, as evidenced by a comparison with the Fair Labor Standards Act—the definitions of employee; the "affecting commerce" of the National Labor Relations Act as against the "production of goods for commerce" of the Fair Labor Standards Act; the "affirmative action . . . as will effectuate the policies of the Act" of the former as against the "restrain violations" of the latter. The court in *Phelps Dodge supra*, upon which petitioner heavily relies, in granting reinstatement with back pay to persons who were refused employment because of union affiliation found ample basis for its decision in the language of the National Labor Relations Act wherein the "employee" is broadly defined and wherein it is declared to be an unfair labor practice for an employer to discourage membership in any labor organization by discrimination in regard to "hire". Using the "affirmative action" authorized by the Act, including the power to grant "back pay," the court made a sound decision. The absence of such lan-

guage in the Fair Labor Standards Act, which was enacted after the National Labor Relations Act, is significant. The policies to be followed in a statute must be found in the language of the Act itself, and the machinery to effectuate the purposes of the Act must be more specific than the mere declaration of a policy. Similarly, the Antitrust decisions find their basis in the language of the Antitrust laws, and although the language there is more general than that of the National Labor Relations Act, the mandate there to enjoin or otherwise prohibit violations amply justifies the dissolution of the combinations and conspiracies which are violative of the statute, and the disgorging of unlawful fruits is part of the prohibition of the violation, unlike the penalty of an award for lost wages against an employer under the Fair Labor Standards Act who in fact retains no "illegal fruits" as a result of his unlawful act in discriminatorily discharging the employee. The Emergency Price Control Act, 50 U.S.C.A. App. 901, et seq., provided for enforcement by injunction or "other order" as well as an action in favor of the tenant against the landlord to recover excess rent. The court in *Porter v. Warner*, 328 U.S. 395, did not exceed the proper exercise of equitable powers in granting to the tenant the excess rent ancillary to the injunction proceeding, because there was a legal basis for the award. Further, the court was interpreting an emergency act and for this reason it may well have been justified in retrieving the excess rent in that proceeding although the better procedure might be in most cases of that type to treat the separate provisions of the statute providing

for injunction and the award of excess rent as exclusive of each other. The 1949 proviso to Section 17 of the Fair Labor Standards Act is indicative of this policy of Congress.

B.

If the district courts previously had the power under Section 17 of the Fair Labor Standards Act to order reimbursement for loss of wages resulting from unlawful discriminatory discharge, such jurisdiction was withdrawn under the 1949 proviso added to Section 17 of the Act. While petitioner and the Circuit Court treated the proviso as dealing solely with the minimum wage and overtime compensation provisions, it is possible to construe the proviso as dealing also with any lost or ad interim wages recoverable by an employee, or for him by the Secretary, on account of unlawful discharge. However, the legislative history of the proviso, together with an analysis of the reasoning of the court in the *O'Grady* case and in *McComb v. Scerbo*, 177 F.2d 137, shows that the Congress intended, by the proviso, to reverse both decisions. See Committee Report, Statement of the Managers on the Part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess., p. 32; U.S. Code Congressional Service, 1949, p. 2251, 2273. Both the *O'Grady* and *Scerbo* cases rely on *Walling v. Miller*, *supra*, particularly the concurring opinion of Judge Woodrough (at page 633), who found the power to grant the wages (actually worked for in the *Miller* case) within the traditional powers of equity to "restrain". The courts in these cases treated them as indistinguish-

able, and they come within "such decisions" as Congress intended to reverse by the proviso.

II.

If the district courts have power to order reimbursement for loss of wages resulting from unlawful discharge under the Act in suits for injunction brought by the Secretary, the court, sitting as a court of equity, is not deprived of discretion in granting or denying such wages or damages. Petitioner indicates that it may be mandatory upon the court in such a case as this to grant such damages or lost wages; but petitioner throughout his argument calls upon the broad, comprehensive, traditional powers of equity as a basis for the power sought while attempting to deny equity its broadest, most comprehensive and traditional power; the exercise of discretion, the very essence of equity. An appeal to equity jurisdiction is an appeal to the sound discretion of the court.

ARGUMENT.

I.

The jurisdiction granted by Section 17 of the Fair Labor Standards Act "to restrain violations" does not include the power to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act.

Petitioner finds in the Fair Labor Standards Act the power in the district courts to grant "reimbursement

for loss of wages" resulting from discriminatory discharge. This power is not spelled out specifically in the Act, nor is it referred to generally therein, but, petitioner argues, it is power "ancillary" to the authority "to restrain violations", and comes within the "inherent equitable powers" available "to give effect to the policy of Congress."

An analysis of petitioner's position shows, however, that he finds the purposes and policies, and the machinery, relating to loss of wages from discriminatory discharge not in the Fair Labor Standards Act, but in the National Labor Relations Act. (Petitioner's Brief, pages 7, 15, 16, 22-30); and he draws analogies between the Fair Labor Standards Act and other statutes for this jurisdiction and power. Actually the burden of petitioner's argument is that the power *should* exist; that the Secretary *needs* such power for effective enforcement of the Act; and that the failure so to interpret the Act falls short of full protection to the employee. We believe that these arguments should be directed to Congress, for we find nothing in the Act to substantiate petitioner's position.

A.

The district courts were not originally granted the power, under Section 17 of the Fair Labor Standards Act, to order reimbursement for loss of wages resulting from discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act; nor is such power derived from the ancillary powers of equity jurisdiction.

1. The Fair Labor Standards Act.

There is no specific language in the Act[2] to authorize the court to grant "lost wages" resulting from discriminatory discharge. Section 17 of the Act grants the district courts jurisdiction "to restrain violations of Section 15." The latter section enumerates five types of unlawful acts: to transport goods in commerce, to pay less than minimum wages, to discharge or in any other manner discriminate against any employee, to violate the child labor provisions, and to violate the record keeping provisions. "To restrain" these violations is to stop them. In every case the injunction would, and could, normally be prospective in nature. Logically, to "restrain" a discharge which had already occurred, the court would order the discrimination (in preventing the employee from working) to cease. Nothing in the Act permits damages for the unlawful discharge, or provides for an order of "restitution". If there is a *status quo* to be restored by the injunction, it is the reinstatement of the employee to his job: that was the status when the unlawful act occurred. Even assuming for the moment that a court of equity within its inherent power might grant such lost wages ancillary to an order for reinstatement, would it be fully justified in doing so under so limited an enactment, especially where the statute provides for reimbursement of unpaid minimum and overtime wages, but is silent as to wages lost because of discharge. The absence of such a remedial provision makes it appear that it was not

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[2] Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910, 29 U.S.C.A. 201 et seq.

the "policy of the Act" to validate a claim for such lost wages. The purpose of the Act was to eliminate certain conditions, but this apparently was not one of the vehicles to effectuate this purpose. The whole Act must be considered in order to determine the policy to be followed in effectuating its purposes.

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the Act, being aided in their interpretation by the cannons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning and cannot be extended beyond it because of some supposed policy of the law or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority." 59 C.J., Statutes, Sec. 569, pp. 952-957. The statute must be construed consistent with principles of law (id. at p. 958), the doctrine of "equitable construction wherein a statute is extended to cases not within its words, having been abandoned" (id. Sec. 572, p. 964). Words used in a statute mean what they say; they are attributed ordinary meaning (id. Sec. 577, p. 975), or legal or common-law meaning (id. Sec. 578, p. 979). The word "restrain", which petitioner reads or construes to read "restrain and order payment of

damages", means, in this sense "to prohibit from action" or "to enjoin (in equity)". Black's Law Dictionary. This word is not enough upon which to build a cause of action in the employee, or a cause of action in the Secretary to sue for damages on behalf of the employee.

2. *Ancillary power of equity.*

Nor can equity, under the guise of effectuating general policy, use "ancillary" power to order payment of wages lost as a result of unlawful discharge. Petitioner urges that this power exists, and should be used to make the restraint effective and to vindicate public policy (Petitioner's Brief, p. 9), arguing that the court's power does not depend upon specific statutory authorization (Petitioner's Brief p. 10). We have found no specific statutory authorization for the Secretary to sue for such ad interim wages on behalf of the government or the employee, nor does the statute confer jurisdiction upon the district courts over a civil suit to recover damages for discriminatory discharge. *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703; *Powell v. Washington Post* (C.A.D.C.) 14 WH Cases 140. No such cause of action exists at common law in the absence of the breach of an employment contract for a definite term (see 39 C.J., Master and Servant, Sec. 95; 35 Am. Jur., Master and Servant, Sec. 34) and certainly it does not exist in the State of Georgia. *Jackson v. Atlantic Coast Line R.R.*, 8 Ga. App. 495, 69 S.E. 919. Cf. *The Associated Press v. Labor Board*, 301 U.S. 103. But where no legal right is created or jurisdiction granted to the court, no legal or equitable relief can be granted. *Penn-*

sylvania R.R. System v. Pennsylvania R.R. Co., 267 U.S. 203. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323; Cf. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515. Equity follows the law, and "where there is no right to mesne profits at law, none can be recovered in equity." *Peter v. Hargraves*, 5 Gratt. (46 Va.) 12; 21 C.J., Equity Sec. 186, p. 198; 30 C.J.S. Equity, Sec. 103, p. 506. Furthermore, the granting of such ad interim wages, or damages, not having any basis in the statute, becomes punitive: to "vindicate public policy". (See Black's Law Dictionary, Exemplary Damages; Punitive Damages.) "The theory of exemplary, punitive, or vindictive damages . . . involves a blending of the interests of society in general with those of the aggrieved individual in particular. According to the more generally accepted doctrine such damages are awarded by way of punishment to the offender, and as a deterrent, warning or example to defendant and others . . .". 25 C.J.S., Damages, Sec. 117, pp. 705-6. "But the rule is well settled by the weight of authority that it is not the function of a court of equity to assess punitive damages in the absence of express statutory provisions and a court of equity will assess actual damages only as ancillary to equitable relief." *Capital Electric Power Ass'n v. McGuffee*, (Miss.) 83 So. 2d 837, 844; 56 A.L.R. 2d 405, 412; 19 Am. Jur., Equity Sec. 125, p. 125; 30 C.J.S., Equity, Sec. 72, p. 426; 25 C.J.S., Damages, Sec. 117, p. 709. "Ancillary" powers of equity refer to the exercise of legal powers in conjunction with equitable powers, sub-

ordinate to the principal equitable proceeding. See Black's Law Dictionary, Ancillary; 30 C.J.S., Equity, Sec. 11. Thus, while the remedies provided by Congress may, in the opinion of the Secretary, be inadequate to protect the employee and provide the most effective enforcement of the Act, yet they are such as Congress has seen fit to give and which it alone has the power to enlarge. The courts cannot take on the legislative function, although they may see the need for an amendment to the statute. *Globe Newspaper Co. v. Walker*, 210 U.S. 356.

The contempt cases, such as *Texas and N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, are offered up by petitioner, and have been erroneously interpreted by some courts at times, as authority for the proposition that the court can provide relief or remedies even without a "mandate from Congress" (Petitioner's Brief, p. 10), but there is an obvious and basic distinction between the power of a court to issue an initial mandatory order (such as for damages not authorized by statute, or for defendant to perform an act he is not under legal obligation to perform) and the power to issue a mandatory order to restore the *status quo* existing prior to the violation of a previously issued injunction. A court may protect itself in its own decrees, 12 Am. Jur., Contempt, Secs. 40, 41, but this does not expand its power to decree. The court may punish for violation of its own mandates issued under jurisdictional authority, and although Congress has outlined the power of the courts in contempt proceedings (Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U.S.C.A. 401), the power to punish

for contempt has been held to be inherent. *U.S. v. Hudson*, 7 Cranch. 32; See Anno. 117 Am. St. Rep. 950, 952, 953. Such power, whether inherent or ancillary, is necessary to the exercise of all other powers granted to the court; but all other powers must be granted. Such inherent power, therefore, cannot be called upon to expand the enforcement provisions in a statute.

Finally, the need for fuller protection to the employee and the need for this to implement enforcement, does not substitute for a grant of power. It must be recalled that the Fair Labor Standards Act was a departure from our traditional concepts of the master-servant relationship as well as the regulation of commerce. At that time Congress may well have intended to stop short of creating liability to the employee for discriminatory discharge, leaving the injunction as the sole remedy. Petitioner's argument that the fear of loss of wages will deter the employee from complaining and thus hinder the effective enforcement of the Act fails to take into account the fact that this is not such an unusual burden. The fact of delay is not the fault of the Act, but the fault of enforcement, at times, because of the normal delays in the courts. But the employee bears no greater burden in this respect than onyone who resorts to the courts to enforce legal rights. Almost every litigant is plagued by delays and resulting losses caused thereby. If this had been a situation Congress wanted to remedy, or guard against, certainly some language to this end would have been employed as in the National Labor Relations Act, Sec. 10(c) (29 U.S.C. A. 160(c)). Looking at petitioner's argument from the

other side a moment, the employer in *Phelps Dodge Corp. v. Labor Board, supra,* argued in its brief (85 L. ed at 1274) that it was helpless to guard against excessive awards of back pay (under the National Labor Relations Act) where representatives of the persons claiming to have been discriminated against delayed for more than two years before filing charges and the Board thereafter took an additional two and one-half years to dispose of the case; but the court, in its written opinion, completely ignored this plea, apparently dismissing it as one of the inevitable burdens of litigation. The resulting burden on the employee here, and the effect of this burden upon the administration of the Act, should be similarly treated until Congress decides that the need for a remedy exists and provides one. The existence of this problem confers no jurisdiction upon the district courts, nor does it expand the power of equity. Cf. *Thompson v. Allen County,* 115 U.S. 550.

3. The O'Grady case.

The reasoning and results in *Walling v. O'Grady, supra,* were based upon certain erroneous assumptions and concepts.

The *O'Grady* case first assumes that the employee had a legal right to recover damages, or ad interim wages, from the time of the discriminatory discharge until offer of reinstatement. Secondly, the court there saw little difference between granting "lost wages" ancillary to injunction and granting them following a contempt citation to restore the *status quo* previously

ordered by the court. Thirdly, *O'Grady* argues that the employee is left without adequate protection unless equity grants the lost wages. The decision grounds itself in these misconceptions and unwarranted assumptions, and having done so, finds the power to order payment of lost wages within the traditional inherent powers of equity to aid the "public interest", bringing itself into accord with Judge Woodrough in *Walling v. Miller, supra,* at 633. But the two cases are basically different, in that in *Miller* the assessment had a legal basis in the statute whereas in *O'Grady* there was no legal basis for the assessment. The *Miller* case held only that the district court had jurisdiction to allow unpaid minimum and overtime wages (actually worked for), in a suit by the Administrator for injunction, pursuant to a consent decree providing for such payment to the employee. There was no question as to the court's jurisdiction over the subject matter; it was provided for in Section 16 (b). The court, sitting in equity, took complete charge of the matter and disposed of all phases of the case by consent of the parties. No jury trial was involved. Judge Woodrough's concurring pronouncements, insofar as they permit a court of equity to dispose of the entire case using its ancillary power to resolve the legal aspects along with the equitable, are sound; but insofar as they would permit equity to create new rights and liabilities, and to assess penalties or punitive damages in the name of the "public interest" without specific statutory authority, they would be wrong. It was at this point that the court in *O'Grady*, after predicating its reasoning upon a series of mis-

conceptions, finally and completely detached itself from legal reality.

We, therefore, agree with the Fifth Circuit Court of Appeals that reliance in the *O'Grady* case on the cases cited by it was misplaced, and we conclude that the *O'Grady* case is unsound, having been based upon erroneous concepts of the law and having misapplied the powers of equity.

4. Other statutes and decisions thereunder.

Where petitioner finds no language granting the desired jurisdiction and power in the Fair Labor Standards Act, he calls upon other enactments and decisions thereunder in order to find this power for the district court. He relies heavily on the *Phelps Dodge* case in its construction and interpretation of the National Labor Relations Act. The National Labor Relations Act (Section 10 (c), 29 U.S.C.A. 160 (c) authorizes the Board "to take such affirmative action including reinstatement of employees, with or without back pay, as well effectuate the policies of this Act," demonstrating that the National Labor Relations Act intended to go much further than the Fair Labor Standards Act; in fact, the former is more comprehensive, dealing with a far more complicated and elusive subject matter than the latter. Its scope is broader and its enforcement machinery accordingly more extensive, as evidenced by a comparison of the two Acts—the definitions of "employee" (N.L.R.A., Sec. 2(3); F.L.S.A., Sec. 2(e); the "affecting commerce" of the National Labor Relations Act (Sec. 2(7)) as

against the "production of goods for commerce" of the Fair Labor Standards Act (Secs. 6 and 7); the "affirmative action . . . as will effectuate the policies of the Act" of the former (Sec. 10(c)) as against the "restrain violations" of the latter (Sec. 17). And the 1949 proviso to Section 17 evidenced the original Congressional intention to provide restricted and limited jurisdiction of the court to take affirmative action. The principal point in *Phelps Dodge* relied upon by petitioner is that the court permitted back pay to "employees" who were not "reinstated" but in fact "instated" (new employees), thus holding that the back pay provisions applied to persons who were refused employment because of their affiliation with the union, although they might have never been employees of the Company. But the authority for this holding is found clearly within the Act, wherein it is stated that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to *hire* [emphasis supplied] or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." National Labor Relations Act, Sec. 8(3), 29 U.S.C.A. 158(3). The court had ample reason to hold that the word "hire" applied to discrimination against persons seeking initial employment, especially in view of the full language of the section covering all aspects of employment and the definition of "employee" (National Labor Relations Act, Sec. 2(3), 29 U.S.C.A. 152 (3)). Petitioner views this decision as having been based more in the necessity for "effectuating the policies of the Act" than in the language of the Act itself. But it is the

language used by Congress that constitutes the policy of the Act. Petitioner accuses the Fifth Circuit of misreading *Phelps Dodge*, but the Fifth Circuit seems to have found the specific language relied upon by this court in deciding *Phelps Dodge* and to have made a correct appraisal of the decision. Nor is petitioner's distinction between the "granting" of powers to a Board, on the one hand, and the "utilization" of the existing powers of the courts, on the other, a valid distinction, because Congress specifically outlines the jurisdiction of each in its enactments, and in the Fair Labor Standards Act has seen fit to grant limited jurisdiction to the district courts for the enforcement of that Act. It is certainly to be presumed that if Congress contemplated the award of damages for discriminatory discharge, or the payment of ad interim wages, it would have made some mention thereof, particularly in view of the fact that no such right ever existed at common law. For the same reason Congress was specific in the enactment of the National Labor Relations Act. The National Labor Relations Act was enacted before the Fair Labor Standards Act and in drafting the latter Congress had before it all of the language of the former, yet declined to provide for reinstatement "with back pay". The absence of such provision is significant.

While Congress may declare a policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom

of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (National Labor Relations Act, Sec. 1, 29 U.S.C.A. 151), on the one hand, and "to correct and as rapidly as practicable to eliminate the conditions [detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers] without substantially curtailing employment or earning power" (Fair Labor Standards Act, Secs. 2(a) and 2(b), 29 U.S.C.A. 202(a) and 202(b)), on the other hand, in each instance it goes further and specifically defines the measures to be taken to effectuate these policies. In each statute the machinery for effectuating the policy of the Act is fully described, and the exercise of any power by any board or court, the jurisdiction of which is defined or delimited by Congress, must be found in the Act itself in language more specific than the declaration of the policy of the Act.

The Antitrust decisions similarly find their basis in the language of the Antitrust laws. We will not dwell on these cases except to point out, for example, that the Antitrust Act (26 Stat. 209, Sec. 4, 15 U.S.C.A. 4) not only grants the district courts jurisdiction "to prevent and restrain violations" but goes further in describing the proceedings to be by way of petition setting forth the case and praying that such violation "shall be enjoined or otherwise prohibited". The acts to be prohibited are described in the Act, such as "contract, com-

bination in the form of trusts or otherwise, or conspiracy, in restraint of trade" (Antitrust Act, Sec. 1, 15 U.S.C.A. 1), attempt to "monopolize or combine or conspire" (Antitrust Act, Sec. 2, 15 U.S.C.A. 2). Under such authority the courts are permitted, as in *International Boxing Club v. U.S.*, 358 U.S. 242, to order dissolution, divestiture and enjoin or otherwise prohibit the existence of such restraints of trade; in fact, the courts are required to prohibit these things. Nevertheless, except for the forfeiture of property intransit, as specifically provided by the Act, (Sec. 5) the orders of court look to the future by undoing the present status. Where unjust or unlawful fruits have been taken by a party, they are wiped out, but this is specifically related to the existence of a condition—an unjust enrichment—, and is unlike a requirement that an employer pay for services not rendered to him. While the employee may have suffered for a while for the lack of work, the employer in such cases reaps no illegal fruits to be disgorged. The Antitrust cases make no effort to go beyond the authority of the Act, although that authority be granted in general terms. The apparent sweeping scope of the injunctions under the Antitrust Act includes only those prohibitions and mandates necessary to effect the primary order. to wipe out the conspiracy and prevent its further use.

Petitioner relies heavily on *Porter v. Warner, supra.* The Emergency Price Control Act granted the court the power to issue an injunction or "other order" enforcing compliance with the Act (Sec. 205, 56 Stat. 33, c. 26, 50 U.S.C.A. App. 925(a)), and provided for an action in

favor of the purchaser, or tenant, against a person selling, or renting, at prices above those authorized under the Act (50 U.S.C.A. App. 925(e)). The court in *Porter v. Warner, supra,* permitted equity to take charge of the subject matter and, ancillary to the injunction, grant "another order" making restitution of overcharged rent, just as the court ordered the restitution of unpaid overtime wages in *McComb v. Scerbo, supra.* In each case the *right existed,* and it was within the scope of equity, absent any prohibition in the Act, to adjudicate the matter in full and protect all of the parties. The Emergency Price Control Act provided that if the action were instituted by the administrator the buyer was thereafter barred from bringing the action for the same violation (Sec. 205), answering the question raised by Justice L. Hand in the *Scerbo* case in his concurring opinion. The rights created by a statute, and the remedies for the enforcement of those rights, are usually exclusive. *Globe Newspaper Co. v. Walker, supra.* Further, this was "emergency" legislation "passed and interpreted in time of a struggle for national existence. These laws are now in abeyance and they constitute doubtful precedent for the extension of enactments such as this which are intended to represent permanent policy in peaceful times as well." *U. S. v. Parkinson* 240 F.2d 918. The proviso to Section 17 of the Fair Labor Standards Act indicates a policy, however, that the remedies provided for in the statute should not be coupled together in the same action. The restitution of excess rent gave to the tenant what was lawfully his under a right specifically created by statute, and

if he did not recover it himself, the administrator could disgorge the illegal fruits for the Treasury. Both remedies went to prevent inflation. But the granting of ad interim wages gives to the employee something he is not of right entitled to, and penalizes the employer in addition to the other penalties fixed by the Act.

We conclude, and urge the proposition, that Congress specifically included within the penalty and enforcement provisions of the Fair Labor Standards Act all of the sanctions and remedies intended, and that it did not intend to proclaim a policy of, or create a right to, damages for discharge, enforceable in any kind of proceeding, either for the relief of the employee or the vindication of public policy.

B.

If the district courts previously had the power, under Section 17, to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act, such jurisdiction has now been withdrawn under the proviso added to Section 17 of the Act by the 1949 amendment.

Petitioner contends (Petitioner's Brief, p. 35) and the Circuit Court indicated (R.20) that the 1949 proviso to Section 17 dealt solely with the minimum wage and overtime compensation provisions—wages actually worked for. However, if damages, or lost wages, were to be granted to the discharged employee, we believe that petitioner would contend for nothing less than the minimum wages prescribed in the Act. Nothing short

of this would make the employee whole if he had the right to recover. The proviso also prohibits "liquidated damages" being granted in injunction cases, and we think that it may well be broad enough to include any damages or lost wages to which the employee might be entitled under this Act, interpreting it even without reference to its legislative history. Certainly if, as petitioner contends, the "strangers" in *Phelps Dodge* became "employees" merely by virtue of the "policies of the Act", without more, (Petitioner's Brief, p. 28), then the "lost wages" in this case may as easily become "unpaid minimum wages" referred to in the proviso, and thereby withdrawn from the power of the court of equity to grant under Section 17. As pointed out elsewhere in this brief, we do not think the scope and machinery of the Fair Labor Standards Act are nearly so broad and comprehensive as that of the National Labor Relations Act, and we find decisions such as *Phelps Dodge* well grounded in the specific language of the statute, all of which goes to make up the "policies of the Act", rather than being grounded in a mere general policy or purpose without further implementation. But following petitioner's reasoning, wherein he finds powers in that "circumambient aura, so often euphemistically described as 'the policy of the statute'" (L. Hand concurring in *McComb v. Scerbo, supra*, at 141), there would be no reason to exclude "lost wages" from the proviso to Section 17 of the Fair Labor Standards Act. If petitioner's approach is available to find power or meaning in a statute, then we think the above logic should prevail in this case.

But we think better logic is available to interpret the proviso as limiting the court's jurisdiction in injunction cases so as to prevent the kind of order sought here by petitioner. The *O'Grady* case was in effect reversed by the proviso. As stated in the Conference Report as given in the Statement of the Managers on the Part of the House, Rept. No. 1453 on H.R. 5856, 81st Cong., 1st Sess. p. 32, U.S. Code Congressional Service, 1949, p. 2251, 2273: "The [proviso], however, will have the effect of reversing *such decisions* [emphasis supplied] as *McComb v. Scerbo* . . . in which the court included a restitution order in an injunction decree granted under Section 17." *O'Grady* and *Scerbo* both dealt with a "restitution order", the former assuming a right in the discharged employee to recover ad interim wages. Neither saw but little difference between giving reparation as ancillary to injunctive relief and giving back pay where an injunction has been violated as in the *Railway Clerks* case. Both relied on *Walling v. Miller, supra,* particularly the concurring opinion of Judge Woodrough who found the power to grant the wages (actually worked for in the *Miller* case) within the traditional powers of equity "to restrain". In fact, the court in *Scerbo* stated that the cases were indistinguishable (at p. 138). While the facts of the cases differ, this is true in that both cases involved the power to issue a "restitution" order—the very target of the proviso. Furthermore, Congress was certainly well aware of the indistinguishable reasoning and philosophy of the *Miller, O'Grady* and *Scerbo* cases; and the reference to "such decisions" as *Scerbo* in the

legislative history of the proviso (Conference Report, *supra*) must certainly have included *Miller* and *O'Grady;* otherwise, the words "such decisions" would be void of meaning, because these are about the only such decisions.

Petitioner says that the insertion of Section 16(c) leaves no doubt but that the proviso related only to the compensation provisions; but, upon the same reasoning, the failure to provide specifically for award of ad interim wages and their recovery seems to indicate the intention to omit such right and remedy. The rights created by statute, and the remedies for enforcement of those rights are usually exclusive. *Globe Newspaper Co. v. Walker, supra.* Furthermore, the Conference Report specifically recognized the continuing authority of the court in contempt proceedings for enforcement of injunctions issued under Section 17 for violations occurring subsequent to the issuance of such injunctions. The Report seems to be fairly comprehensive and would not have purposely been silent as to the *O'Grady* situation, and the most logical disposition of that case seems, without much question, to have been within the words "such decisions". As in construing a statute, all the words used by the Congress (or by the Conference Committee in this instance) must be attributed some meaning.

II.

If the power exists in the district court to order reimbursement for loss of wages resulting from unlawful discriminatory discharge of employees in violation of Section 15 (a)(3) of the Act in suits for injunction brought by the Secretary of Labor, the court, sitting as a court of equity in such cases, is not deprived of discretion in granting or denying such wages or damages.

Petitioner indicates that it may be mandatory on the court in this case to grant reimbursement to the employees for wages lost because of the discriminatory discharge. (Petitioner's Brief, p. 34, fn. 14.) He questions whether or not the court has any discretion to refrain from ordering restitution in certain cases. But petitioner, throughout his argument, calls upon the broad, comprehensive, traditional powers of equity as the basis for the power sought in this case for the district court; yet at the same time would question the power of a court of equity to exercise discretion—perhaps equity's broadest, most comprehensive and most traditional power; in fact the very essence of equity. Certainly "an appeal to the equity jurisdiction conferred on district court is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith v. Winter Haven*, 320 U.S. 228. This is true even under emergency legislation, such as the Emergency Price Control Act, where the national problems therein dealt with are urgent and require careful and immediate attention through the machinery of the Act. See *Hecht Co. v. Bowles*, 321 U.S. 321. An injunction may not issue as a routine, absolute consequence of a

finding of non-compliance, but may be denied in the sound discretion of the Judge. *Mitchell v. Hodges Contracting Co.*, 238 F.2d 380. See *Mitchell v. Bland*, 241 F.2d 808.

Petitioner states that the court found no mitigating circumstances with respect either to the unlawful discrimination or the resulting wage losses (Petitioner's Brief, pp. 5, 35). This does not seem to be a question to be argued before this court, particularly in view of the printed record here which contains none of the transcript of the testimony. As we have heretofore pointed out, the testimony considered by the District Judge in this case consumed the better part of a week. He declined, in the exercise of the court's discretion, to order reimbursement for lost wages (R.12). While we will not argue abuse of discretion, it may be well to observe in the light of petitioner's indication that in this case an order for lost wages should be mandatory, that the issue in such cases as this is not whether the employee should be reimbursed but rather, under the court's power, what should be done with the employer in the light of the overall circumstances and in the interest of all concerned—the employee, the other employees in the plant, the employer, the community, and the government. Many factors must be considered by the court of equity: the financial position of the employer, the degree to which he has been penalized financially (as in this case, where the employers here have been fined $4,900.00), (R.30, 31), and where wage cases were pending against the employer in large

amounts, (*Mitchell v. Robert DeMario Jewelry, Inc., et al.*, Civil Action Nos. 649 and 654, U.S.D.C., Middle District of Georgia), the effect of such order upon the stability of the employer, and for that matter upon the stability of the employee, and even the attitudes of the parties as discerned by the court. All such factors must be considered if the court is to effectuate the policy of the Act. It becomes obvious that a court of equity must exercise its discretion.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
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